Lutta & 2 others v Co-operative Bank of Kenya (Civil Suit 23 of 2018) [2023] KEHC 19568 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19568 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL SUIT 23 OF 2018

SC CHIRCHIR, J

JUNE 29, 2023

BETWEEN

JACKSON MUTIMBA LUTTA ..... 1ST PLAINTIFF

EUNICE VIHENDA DANGANA ..... 2ND PLAINTIFF

KORA CONSTRUCTION COMPANY LTD ..... 3RD PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA ..... DEFENDANT

RULING

1. The defendant's notice of motion dated June 28, 2021 seeks for the dismissal of the suit for want of the prosecution. It is premised on the grounds appearing on the face of the application and the supporting affidavit of Vivian Ratemo, who describes herself as a practitioner in the law firm of Ocharo Kibera and Company Advocates, who represent the defendant in this suit

The Applicant's Case

2. It is the applicant's case that it is the one who has been taking steps towards the prosecution of the case, while the owner, the plaintiff has been passive; that he plaintiff is enjoying the comfort of the temporary injunction that was granted to them.

3. It is the further deponed that the suit has been in court for almost a decade, and that the last time any action was taken was on March 1, 2020.

4. The applicant further points out that the defendant has suffered prejudice as, all the while, the plaintiff has not been making payments towards the liquidation of the debt.

The Respondent's Case.

5. The application is opposed through the replying affidavit of the 1st plaintiff. It is the plaintiff case that the defendant has not met the threshold for dismissal of suits as set out in order 17 rule 2 of the *Civil procedure Rules*; that at the time of filing of the application, 2 years had not yet lapsed from the time an action was taken on the suit.

6. The plaintiff further states that the delay was occasioned by their previous advocate on record. It is further contended that no injustice has been caused by the delay and that fair trail can still be achieved.

7. The application was canvased by way of written submissions.

Applicant's Submissions

8. The applicant submits that the plaintiff's attempts to blame the advocates for their inaction is insincere. They point out that it is instructive that the plaintiffs have been represented by four firms of Advocates since the suit began , and they believe that problem may not be with the Advocates, but the plaintiffs.

9. It is the applicant's further submission that the alleged inaction by the plaintiff's advocates have not been sufficiently explained or demonstrated. They have relied on the case of *Rupa Savings & Credit Society vs Violet Shidogo* (2022) eKLR to buttress their submissions in this regard.

10. The applicant further contends that its application is premised on order 17 rule 2 sub-rule 1 as read with sub-rule (3) of the *Civil Procedure Rules* which entitles the defendant to seek for dismissal when the suit has remained inactive for a period of one year.

11. That contrary to the position taken by the plaintiffs, the suit stands dismissed automatically at the lapse of 2 years of inaction as per the provisions of order 17 (2) (5) of the *Civil Procedure Rules*, and that an application is not necessary for purposes of sub- rule 5 of rule 2 of order 17.

12. The applicant further argues that by basing their defence to this application on order 17(2)(5) instead of order 17(2) sub-rule (1) and (3) the plaintiffs have lost an opportunity to show cause why the suit should not be dismissed, which this application, in effect, was asking them to. It is finally submitted that this suit was probably meant to operate as a panacea to repaying the loan.

13. The applicant further submits that the defendant has suffered injustice due to delay in repayment of the loan yet no injustice has been visited upon the plaintiffs.

14. The applicant finally submits bringing the suit by way of originating summons, was a way of evading any objections arising from the fact that another suit being HCC No 69 of 2008 which dealt with similar issues had been dismissed.

Respondent's Submissions.

15. It is the respondent's submission that the application is brought under order 17 rules 2 which requires that the application can only be made when the suit had remained dormant for 2 years. That consequently, the threshold for dismissal has not been met as required by order 17 rules 2 of the *Civil Procedure (amendment) Rules 2020*.

16. It is further argued that the applicant has failed to demonstrate that it has suffered any prejudice as a result of the delay. That in view of the Covid 19 pandemic, the delay is not inordinate and is excusable.

17. That the delay of 15 months is not prolonged and the same is excusable. The plaintiff has relied on the case of *Ivita vs Kyumbu* (1984) KLR,441 *Mwangi Kimenyi vs the Attorney General & another* civil Suit

Misc No 720/21009 and *Nilesh Premchand Shah & another vs MD Popat & another* (2016) eKLR, to buttress their submissions

18. It is further submitted that the loan has been overpaid and it is only that the defendant has refused to discharge the property.

Determination

19. I have considered the application, and annextures, thereto. I have also considered the respondent's response, and the authorities relied by each party. Finally, I have also gone through past proceedings on this suit and considered the same.

Background.

20. From what I can glean from the record, on October 17, 2008, the plaintiff herein filed Kakamega High Court Civil Case No 69 of 2008. The orders sought for in the said suit included a declaration of accounts by the Defendant and a restraining order, barring the defendant herein from selling land parcels Nos Isukha/Lubao/705 and Isukha/Lubao/2105 (suit properties) . It is deponed, and which fact is not controverted, that the said suit was dismissed. What is unclear is if the said suit was dismissed on merit.

21. Upon dismissal of the suit, the parties resorted to negotiation but the said negotiations were apparently not successful. The plaintiff then moved back to court. This time to the Environment and Land Court , and by way of originating summons(OS). The OS was filed on February 5, 2012 and sought for the determination of the following questions:

    1. Whether the defendant advanced to the 3rd plaintiff a loan of kshs 3,500,000.00 in or about May 2007 at the rate of kshs.20% interest per annum

    2. Whether the 1st and 2nd plaintiff charged their parcels of land being Title Nos:Isukha/Lubao/705 and 2105 as security for the said loan to the 3rd plaintiff

    3. Whether the interest and penalties charged on the 3rd plaintiff had the expectations of being able to repay the loan as agreed.

    4. Whether the 3rd plaintiff has to date paid kshs 6,500.00 towards repayment of the loan.

    5. Whether it is fair and just for the defendant to still threaten to sell the charged properties in the circumstances.

    6. Whether the plaintiffs are in the circumstances entitled to the equity of redemption.

22. The OS was transferred to this court and given the current case number. Prior to the transfer, the Environment and Land Court had on October 2, 2014 and August 9, 2018 issued notices to show cause why the suit should not be dismissed for want of prosecution.

23. Firstly, it is appropriate to first address the applicable provisions of the *Civil Procedure Rules* governing the dismissal of suits for want of prosecution. In view of the divergent positions taken by the parties herein regarding the applicable sections of the rules, I find it necessary to set out the entire order 17 rule 2 of the *Civil Procedure Rules*. It states; -

    " Notice to show cause why suit should not be dismissed.

    2.

(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this order."

(5) A suit stands dismissed after two years where no step has been taken

(6) A party may apply to court after dismissal of a suit under this order."

24. Thus, under sub- rule 1 of rule 2, upon expiring of one year without any steps being taken on the suit, the court can issue notice to the parties; under sub- rule 3 a party may apply for dismissal as provided under sub rule 1, that is at the expiry of one year; and finally under sub-rule 5 the suit automatically stands dismissed if the suit has remained dormant for two years.

I therefore agree with the respondent that dismissal under sub- rule 5 do not require an application as the dismissal is automatic. The plaintiff's contention that the application is premature is either based on a misapprehension of the provisions of order 17 rule 2 or is a deliberate attempt to mislead.

25. The suit was last in court on March 12, 2020 and therefore had been inactive for a period of 1 year 5 months as at August 27, 2021 when the application herein was filed. The matter was therefore ripe for dismissal and the application cannot be said to be premature.

26. What is the consideration when a court is determining an application of this kind?

The principles were set out in the case of *Ivita Vs Kyumbu* (1984) KLR 441, cited by the respondent where the court held:

> "So, the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. The defendant must satisfy the court that he would be prejudiced by the delay, or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.....where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume the delay is not only prolonged but is also inexcusable....."

27. In the case of *Mwangi s Kimenyi vs Attorney general and another* Misc 720/2009(2014) KLR again cited by the respondent, the court reiterated the same of the principles in *Ivita* case (*supra*) but set out the principles as follows; -

1. "Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case.

2. Whether the delay is intentional, continuous and, therefore, inexcusable.

3. Whether the delay is an abuse of the court process

4. Whether the delay gives rise to substantial risk to fair-trial or causes serious prejudice to the defendant

5. What prejudice will the dismissal occasion the plaintiff?

6. Whether the plaintiff has offered a reasonable explanation for the delay.

7. Even if there has been delay what does the interest of justice dictate"

28. Is the delay prolonged and inexcusable? There is no contest on the fact that the delay is for 1 year and 5 months. What constitute prolonged delay varies as per the circumstances of each case.(see *Daudi Mutua vs Crown industries ltd* (2022) e KLR and *Agip (k) ltd vs Highlands Tyres Ltd*(2001)KLR630). To determine whether the delay of 1 year 5 months is prolonged in the circumstances of this case, it would be necessary to consider the explanation given by the plaintiff, as well as the prevailing circumstances.

29. What is the plaintiff's explanation for the delay? The plaintiff has cited the outbreak of covid 19 pandemic as one of the reasons. However, this issue was only brought up in the submissions by the counsel. This averment does not appear anywhere in the affidavit. It amounts to giving evidence from the bar and I will therefore ignore it.

30. The other explanation is that, it is their erstwhile advocate who failed to follow up on the case. However, the plaintiffs have not shown what attempts they made in following up their Advocates

31. In the case of *Habo Agencies Ltd vs Wilfred Odhiambo Musingo* (2015) eKLR. The court was considering a delay in filing an appeal, but the issue for consideration was the same as the issue herein; mistakes by advocates. The Court of Appeal emphasized that it is not enough to simply blame the advocates on record for all manner of indiscretions; that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. The court while citing with approval the case of *Bains Constructions Co Ltd vs John Nzare Ogowe* (2011) eKLR further observed 'whereas it is true in general, mistakes of counsel should not be visited upon a client, it is equally true that counsel as Agent who is vested with authority to perform some duties, and does not perform the duty as directed by the principal, such principal should bear the consequences"

32. My understanding of the finding in *Bains* case(*supra*) is that once a litigant realizes that his or her advocate is failing , she or he ought to take such steps as may be necessary to ensure that the case moves forward .It is rather odd for a party to hire an Advocate , presumably pay fees or at least some deposit for the service, and not bother to find out if they are getting value for their money. It was an act of indolence for a plaintiff to sit back for a whole year and not bother to find out what their Advocate was doing, unless they considered the delay advantageous to them.

33. There is a noticeable trend among litigants, when confronted with adverse proceedings or order arising from their indolence to quickly hire a new Advocate to help them plead "mistakes of the previous Advocate on record" for purposes of getting one relief or another from the courts. It is sometimes a ploy to deflect blame from where it should land. A litigant has the right to hire and fire an Advocate and for that, the court cannot fault the plaintiffs. However, the Plaintiffs herein are on their 4th Advocate since the suit began. One cannot help but wonder whether this frequent change is being used as a means to delay the determination of the suit

34. Thus, the plaintiffs herein have not only been indolent in prosecuting the case, but the lack of seriousness in explaining the delay is quite telling.

35. There is another reason to consider the delay inexcusable. The suit has been in court for the last 11 years. During that period, the court has issued two notices to show cause at different times as to why the suit should not be dismissed for want of prosecution. Naturally, the two notices should have reminded the plaintiffs that the suit was taking unusually long to be determined, and with it, the attendant threat of dismissal. It is apparent that they were unmoved.

36. I am not also convinced that their insistence that the suit was not yet due for dismissal was made innocently. It was an attempt to mislead the court. My observation is based on the fact that, the plaintiffs, while arguing that the application was premature on the basis of order 17 rule (2) (5) also went on to plead their case on the basis of order 17 rule2(5). This means they were alive to the fact that their suit was indeed ripe for dismissal under order 17 rule 2(5).

37. It is not also lost on this court that a civil suit touching on the same subject matter had earlier been filed and dismissed on grounds that are not clear to this court. But the plaintiffs came back to court, by way of originating summons and invoking the jurisdiction of the Environment and Land Court. The reliefs being sought have the same effect as the previous suit. The plaintiff's action in this regard constitute an abuse of the court process.

38. Further, I take note of the fact that one of the reliefs being sought in this suit is a declaration to the effect that the loan has been repaid in full. If that be the case, one would have expected the plaintiffs to fastrack the suit with the hope of realizing the aforesaid relief. The disinterest in prosecuting the suit, in the circumstances, is at variance with the desired relief.

39. The plaintiffs have argued that the defendant has not demonstrated any prejudice suffered, however, the defendant has submitted that they have been prejudiced in the sense that the debt keeps accruing.

40. In conclusion it is my finding that firstly, the delay of 1 year 5 months, in the circumstances of this case, is inordinate. Secondly, there is no reasonable explanation that has been offered for the delay and finally that taking into consideration the conduct of the plaintiffs, the delay is an abuse of the court process.

41. The application is merited. The suit herein is dismissed for want of prosecution.

42. The defendant shall have the costs of this application and suit.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JUNE 2023

S. CHIRCHIR

JUDGE

In the presence of; -

Eric- Court Assistant

Ms. Sinana for the Respondent

No appearance the Applicant.